

AMENDED IN SENATE APRIL 18, 2005

AMENDED IN SENATE MARCH 29, 2005

SENATE BILL

No. 706

Introduced by Senator Ortiz

February 22, 2005

An act to amend Sections ~~728, 1748.5, 1871.7, 1879.3, and 12921.8~~ of, ~~and to add Section 12921.95 to,~~ the Insurance Code, relating to the Insurance Commissioner.

LEGISLATIVE COUNSEL'S DIGEST

SB 706, as amended, Ortiz. Insurance Commissioner: enforcement.

~~Existing law authorizes the Insurance Commissioner to issue an order suspending or removing a person holding any of specified positions with an insurer from his or her office or employment with the insurer and to prohibit the person from further participating in any manner in the conduct of the business of the insurer, except with the prior consent of the commissioner, if the commissioner makes certain findings. Under existing law, an order of this type may, in some cases, be issued only after notice and a hearing, and in other cases may be issued immediately.~~

~~Existing law allows the commissioner to issue an order suspending or removing any person who participates or may participate in a production agency, as defined, or is licensed as a producer, from his or her office or employment with the production agency and prohibiting the person from participating in any manner in the conduct of the business of an insurer or production agency, except with the prior consent of the commissioner, if the commissioner makes certain findings. Under existing law, an order of this type may, in some cases, be issued only after notice and a hearing, and in other cases may be issued immediately.~~

~~This bill would revise and expand the findings that would allow the commissioner to issue orders of these types, and would make specified changes to the procedures for conducting hearings on these orders. The bill would also expand the list of licensed persons or organizations who are deemed to be production agencies for purposes of these provisions.~~

Existing law provides that it is unlawful to knowingly employ runners, cappers, steerers, or other persons to procure clients or patients to perform or obtain services or benefits pursuant to specified provisions of law, or to procure clients or patients to perform or obtain services or benefits under a contract of insurance or that will be the basis for a claim against an insured individual or his or her insurer. Existing law allows a district attorney, the Insurance Commissioner, or any interested person to bring a civil action for a violation of these provisions.

This bill would require, in an action brought by an interested person, that the parties serve the commissioner and the local district attorney with complete copies, signed by the parties, of any settlement of the action, and would provide that no settlement shall be binding and enforceable until 25 days after the settlement has been served on the commissioner. The bill would provide that, if the commissioner has proceeded with an action *on or after January 1, 2006, and prior to January 1, 2011*, the commissioner shall be entitled to attorneys' fees and costs in addition to any judgment. The bill would require that the penalties not awarded to a private party, after satisfaction of the amount of attorneys' fees and costs incurred by the commissioner, be deposited in the General Fund and, upon appropriation, be apportioned as specified.

Existing law requires the commissioner to appoint full-time attorneys and supervisory and investigatory personnel within the Fraud Division of the Department of Insurance.

This bill would delete the reference to full time, and would require the commissioner, in addition, to assign ~~attorneys~~ *staff counsel who are* employed by the department and *are* under the supervision of the department's General Counsel to advise the department's Fraud Division and for other specified purposes.

Existing law allows the commissioner to issue a cease and desist order, and to impose a fine in a specified amount, against any person acting as, or holding himself or herself out as, an insurance agent or broker without being so licensed, and against any person holding out

that person as transacting, or transacting, the business of insurance without having been issued a certificate of authority.

This bill would revise the circumstances in which the commissioner may issue a cease and desist order for acts of this type, and would revise the amount of the fine that may be imposed, as specified. *The bill would prohibit the commissioner from imposing a fine against a person who has, without a license, acted in a capacity for which a license or registration was required, or against a person who aided or abetted such a person, unless the conduct was in intentional or clearly negligent disregard of the requirement for a license or registration.*

~~The bill would provide that, in addition to any other disciplinary measures the commissioner may take, whenever the commissioner finds that a licensee's violation of specified provisions of law has resulted in loss to individual insureds or claimants, designated classes of insureds or claimants, insurers, or production agents, the commissioner may, following a hearing if one is requested, order the payment of restitution.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 ~~SECTION 1. Section 728 of the Insurance Code is amended~~
2 ~~to read:~~
3 ~~728. (a) For the purposes of this section, the following~~
4 ~~definitions are applicable:~~
5 ~~(1) "Subject person" means any director, officer, or employee~~
6 ~~or other natural person who participates in the management,~~
7 ~~direction, or control of an insurer.~~
8 ~~(2) "Insurer" means any domestic insurer, and any insurer that~~
9 ~~is admitted to transact insurance in this state, provided that if a~~
10 ~~subject person of an insurer is not a resident of California, or~~
11 ~~operating out of a place of business within California, then the~~
12 ~~subject person shall be engaged in the direct management,~~
13 ~~direction, or control of the insurer in California in order to come~~
14 ~~within the provisions of this section.~~
15 ~~(b) If, after notice and a hearing, the commissioner finds all of~~
16 ~~the following, the commissioner may issue an order removing a~~
17 ~~subject person from his or her office or employment with the~~
18 ~~insurer and prohibiting the subject person from further~~

1 participating in any manner in the conduct of the business of the
2 insurer, except with the prior consent of the commissioner:

3 (1) ~~The subject person has engaged in an act of misconduct~~
4 ~~that involves any of the following:~~

5 ~~(A) Fraud.~~

6 ~~(B) Theft, embezzlement, misappropriation of moneys or~~
7 ~~property, participation in a ponzi scheme, or breach of fiduciary~~
8 ~~trust or duty.~~

9 ~~(C) An act that may be prosecuted criminally under any statute~~
10 ~~or regulation, including any provision of this code, relating to~~
11 ~~insurance, securities, tax, or banking.~~

12 ~~(D) An act that has caused financial loss or other injury to an~~
13 ~~insurer, policyholder, creditor, or other licensee of the~~
14 ~~commissioner, or any other person.~~

15 ~~(E) A willful act or omission involving personal dishonesty~~
16 ~~that exposed a person to financial or other injury.~~

17 (2) ~~The act of misconduct is relevant in that it demonstrates~~
18 ~~unfitness to continue as a subject person or may result in the~~
19 ~~material deficiency of an insurer with respect to one or more of~~
20 ~~the items set forth in Section 717.~~

21 ~~(c) (1) If the commissioner gives written notice pursuant to~~
22 ~~subdivision (b) to a subject person, the commissioner may~~
23 ~~immediately issue an order suspending the subject person from~~
24 ~~his or her office or employment with the insurer and prohibiting~~
25 ~~the subject person from further participating in any manner in the~~
26 ~~conduct of the business of an insurer, except with the prior~~
27 ~~consent of the commissioner, if the commissioner does each of~~
28 ~~the following:~~

29 ~~(A) Finds that failure to immediately issue the order may~~
30 ~~result in an immediate risk that an insurer will be materially~~
31 ~~deficient with respect to one or more of the items set forth in~~
32 ~~Section 717, or may otherwise result in an immediate risk of~~
33 ~~financial or other injury to an insurer, policyholder, creditor, or~~
34 ~~other licensee of the commissioner, or any other person.~~

35 ~~(B) Serves that subject person and the insurer with written~~
36 ~~notice of the suspension order.~~

37 ~~(C) Finds that all of the necessary factors are present that~~
38 ~~would permit the commissioner, after notice and a hearing, to~~
39 ~~issue an order pursuant to subdivision (b) removing a subject~~
40 ~~person from his or her office or employment with the insurer and~~

1 prohibiting the subject person from further participating in any
2 manner in the conduct of the business of an insurer.

3 ~~(2) Any suspension order issued pursuant to paragraph (1) of~~
4 ~~this subdivision shall be effective until the date the commissioner~~
5 ~~dismisses the charges contained in the notice served under~~
6 ~~subdivision (b) or paragraph (1) of this subdivision, the effective~~
7 ~~date of an order issued by the commissioner pursuant to~~
8 ~~subdivision (b), or a court issues a stay of the order pursuant to~~
9 ~~subdivision (d).~~

10 ~~(d) Within 10 days after a subject person has been served with~~
11 ~~an order of suspension pursuant to subdivision (c), the person~~
12 ~~may apply to the superior court of the county in which the~~
13 ~~principal office of the insurer is located for a stay of the order~~
14 ~~pending completion of the proceedings pursuant to subdivision~~
15 ~~(b), and the court shall have jurisdiction to issue an order staying~~
16 ~~the suspension. Nothing in this subdivision shall be deemed to~~
17 ~~authorize the court to issue a stay order on an ex parte basis.~~

18 ~~(e) (1) If the commissioner finds both of the following, he or~~
19 ~~she may immediately issue an order suspending a subject person~~
20 ~~from the person's office or employment with an insurer and~~
21 ~~prohibiting the subject person from further participating in any~~
22 ~~manner in the conduct of the business of an insurer, except with~~
23 ~~the prior consent of the commissioner:~~

24 ~~(A) That the subject person has been charged in an indictment~~
25 ~~issued by a grand jury, or in an information, complaint, or similar~~
26 ~~pleading issued by a United States attorney, district attorney, or~~
27 ~~other governmental official or agency authorized to prosecute~~
28 ~~crimes, with a crime punishable by imprisonment for a term~~
29 ~~exceeding one year that involves any of the following:~~

30 ~~(i) Fraud.~~

31 ~~(ii) A willful act or omission involving personal dishonesty in~~
32 ~~the acceptance, custody, or payment of money or property.~~

33 ~~(iii) Theft, embezzlement, misappropriation of moneys or~~
34 ~~property, participation in a ponzi scheme, or breach of fiduciary~~
35 ~~trust or duty.~~

36 ~~(iv) An act that may be prosecuted criminally under any~~
37 ~~statute or regulation, including any provision of this code,~~
38 ~~relating to insurance, securities, tax, or banking.~~

~~(v) Any matter that relates to the business of insurance and that is set forth in the indictment, information, complaint, or other pleading.~~

~~(B) That a failure to immediately issue the order may result in an immediate risk that an insurer will be materially deficient with respect to one or more of the items set forth in Section 717, or may otherwise result in an immediate risk of financial or other injury to an insurer, policyholder, creditor, or other licensee of the commissioner, or any other person.~~

~~If the criminal proceedings are terminated other than by judgment of conviction, an order issued pursuant to paragraph (1) of this subdivision shall be deemed rescinded as if it had not been issued.~~

~~(2) If the commissioner finds both of the following, he or she may immediately issue an order removing a subject person from the person's office or employment with an insurer and prohibiting the subject person from further participating in any manner in the conduct of the business of the insurer, except with the prior consent of the commissioner:~~

~~(A) That the person has been convicted during the preceding five years of a crime that is punishable by imprisonment for a term exceeding one year.~~

~~(B) That a failure to immediately issue the order may result in an immediate risk that an insurer will be materially deficient with respect to one or more of the items set forth in Section 717, or may otherwise result in an immediate risk of financial or other injury to an insurer, policyholder, creditor, or other licensee of the commissioner, or any other person.~~

~~(3) The fact that any subject person charged with a crime is not convicted of that crime shall not preclude the commissioner from issuing an order regarding the subject person pursuant to other provisions of this code.~~

~~(f) (1) Within 30 days after an order is issued pursuant to subdivision (e) or (e), the subject person to whom the order is issued may choose to do either of the following:~~

~~(A) File with the commissioner an application for a hearing on the order. The commissioner shall, upon written request of the person, extend the 30-day period within which to file an application for a hearing by an additional 30 days provided the request is filed with the commissioner within 30 days after the~~

1 order is issued. If the commissioner fails to commence the
2 hearing within 15 business days after the application is filed, or
3 within a longer period of time to which the person consents, the
4 order shall be deemed rescinded as if it had not been issued.
5 Within 30 days after receipt of the proposed decision, the
6 commissioner shall affirm, modify, or rescind the order;
7 otherwise, the order shall be deemed rescinded as if it had not
8 been issued.

9 (B) Petition for judicial review of the order pursuant to Section
10 1085 of the Code of Civil Procedure, where the court shall
11 exercise its independent judgment on the evidence.

12 (2) The right of any subject person to whom an order is issued
13 pursuant to subdivision (c) or (c) to petition for judicial review of
14 the order shall not be affected by the failure of that person to
15 apply to the commissioner for a hearing on the order as provided
16 by this subdivision.

17 (g) (1) Any person to whom an order is issued pursuant to
18 subdivision (b), (c), or (c) may apply to the commissioner to
19 modify or rescind the order. The commissioner shall not grant the
20 application unless he or she finds that it is reasonable to believe
21 that the person will, if and when he or she becomes a subject
22 person, comply with all of the applicable provisions of this code
23 and of any regulation or order issued thereunder.

24 (2) The right of any person to whom an order is issued
25 pursuant to subdivision (b), (c), or (c) to petition for judicial
26 review of the order shall not be affected by the failure of that
27 person to apply to the commissioner pursuant to paragraph (1).

28 (h) (1) It is unlawful for any subject person or former subject
29 person to whom an order is issued pursuant to subdivision (b), (c)
30 or (c) to do any of the following as long as the order is effective,
31 except with the prior consent of the commissioner:

32 (A) To serve or act as a subject person for or in any insurer.

33 (B) To directly or indirectly solicit, procure, or transfer or
34 attempt to transfer or vote any proxy, consent or authorization
35 with respect to any shares or other securities of any insurer
36 having voting rights.

37 (2) If, after notice and a hearing, the commissioner finds that
38 any person has violated paragraph (1) of this subdivision, the
39 commissioner may order that person to pay to the commissioner
40 a civil penalty in an amount the commissioner may specify;

1 provided however, that the amount of the civil penalty shall not
2 exceed one thousand dollars (\$1,000) for each violation or, in the
3 case of a continuing violation, one thousand dollars (\$1,000) for
4 each day for which the violation continues, which may be
5 recovered in a civil action.

6 In determining the amount of civil penalty to be paid to the
7 commissioner under this paragraph, the commissioner shall
8 consider the financial resources and good faith of the person
9 charged, the gravity of the violation, the history of previous
10 violations by the person, and such other factors as in the opinion
11 of the commissioner may be relevant.

12 (3) If, after notice and a hearing, the commissioner finds that
13 any insurer has knowingly aided and abetted a subject person in
14 a violation of paragraph (1) of this subdivision, the commissioner
15 may order that insurer to pay to the commissioner a civil penalty
16 in an amount the commissioner may specify; provided however,
17 that the amount of the civil penalty shall not exceed ten thousand
18 dollars (\$10,000) for each violation, or in the case of a continuing
19 violation, ten thousand dollars (\$10,000) for each day for which
20 the violation continues up to a maximum of one hundred
21 thousand dollars (\$100,000), which may be recovered in a civil
22 action. Continuation of the subject person's salary or other
23 employee benefits pending final disposition shall not be
24 considered aiding and abetting a subject person.

25 In determining the amount of civil penalty to be paid to the
26 commissioner under this paragraph, the commissioner shall
27 consider the financial resources and good faith of the person
28 charged, the gravity of the violation, the history of previous
29 violations by the person, and such other factors as in the opinion
30 of the commissioner may be relevant.

31 (i) Except as otherwise provided by this section any hearing
32 required by this section shall be conducted in accordance with
33 Chapter 5 (commencing with Section 11500) of Part 1 of
34 Division 3 of Title 2 of the Government Code, subject to the
35 following:

36 (1)

37 Where judicial review is sought by the subject person pursuant
38 to Section 11523 of the Government Code, the court shall
39 exercise its independent judgment upon the evidence.

~~(2) When a subject person to whom an order has been issued pursuant to subdivision (c) or (e) applies to the commissioner for a hearing pursuant to subparagraph (A) of paragraph (1) of subdivision (f), the Office of Administrative Hearings shall schedule the hearing on a priority basis at the earliest possible time and once the hearing is commenced, it shall not be continued for more than three business days without the consent of the subject person.~~

~~(3) If the Office of Administrative Hearings cannot schedule the commencement of a hearing within 15 business days as provided by paragraph (1) of subdivision (f), and the subject person does not waive his or her right to a hearing commencing within 15 days, the hearings may be conducted by administrative law judges appointed by the commissioner. If the subject person chooses to accept a hearing before an administrative law judge appointed by the commissioner, the hearing shall be completed within 45 days of commencement unless additional time is requested by the subject person. If the hearing is not completed within 45 days, the order shall be deemed rescinded as if it had not been issued.~~

~~(j) Nothing in this section is intended to or shall be construed to create a private cause of action against an offending subject person or an insurer or production agency that aids and abets a subject person, based on the standards established by this section or the commissioner's findings or orders pursuant to this section.~~

~~SEC. 2. Section 1748.5 of the Insurance Code is amended to read:~~

~~1748.5. (a) For the purposes of this section, the following definitions are applicable:~~

~~(1) "Production agency" means any person or organization licensed under Chapter 5 (commencing with Section 1621), Chapter 5A (commencing with Section 1759), Chapter 6 (commencing with Section 1760), Chapter 6.5 (commencing with Section 1781.1), Chapter 7 (commencing with Section 1800), or Chapter 8 (commencing with Section 1831) of this part; Chapter 1 (commencing with Section 10110) of Part 2, Chapter 4 (commencing with Section 12280) of Part 5, or Part 8 (commencing with Section 12800) of Division 2; or Chapter 1 (commencing with Section 14000) or Chapter 2 (commencing with Section 15000) of Division 5.~~

~~(2) “Subject person” means any person who has participated or may participate in any manner in the business of a production agency, or any person licensed as a producer.~~

~~(3) “Insurer” means any domestic insurer, and any insurer that is admitted to transact insurance in this state.~~

~~(b) If, after notice and a hearing, the commissioner finds all of the following, the commissioner may issue an order removing a subject person from his or her office or employment with the production agency and prohibiting the subject person from participating in any manner in the conduct of the business of an insurer or production agency, except with the prior consent of the commissioner:~~

~~(1) The subject person has engaged in misconduct that involves any of the following:~~

~~(A) An act of misconduct with respect to the business of insurance that has caused financial or other injury to any person.~~

~~(B) Fraud.~~

~~(C) A willful act or omission involving dishonesty that exposed a person to financial or other injury.~~

~~(D) Theft, embezzlement, misappropriation of moneys or property, participation in a ponzi scheme, or breach of fiduciary duty or trust.~~

~~(E) Financial or physical abuse of an elder, or dependent adult.~~

~~(F) An act of misconduct while acting as a caretaker for the client or victim. “Caretaker” means any person who has the care, custody, or control of, or who stands in a position of trust with an elder or a dependent adult as those terms are defined in subdivisions (g) and (h) of Section 368 of the Penal Code.~~

~~(G) An act that may be prosecuted criminally under any statute or regulation, including any provision of this code, relating to insurance, securities, tax, or banking.~~

~~(2) The subject person’s conduct or practice demonstrates unfitness to continue as a subject person, or may cause an insurer to be materially deficient with respect to one or more of the items set forth in Section 717.~~

~~(c) (1) If the commissioner gives written notice pursuant to subdivision (b) to a subject person, the commissioner shall immediately issue an order prohibiting the subject person from participating in any manner in the business of insurance, except~~

1 with the prior consent of the commissioner, if the commissioner
2 does each of the following:

3 (A) Finds that failure to immediately issue the order may
4 result in an immediate risk that an insurer will be materially
5 deficient with respect to one or more of the items set forth in
6 Section 717, or may otherwise result in an immediate risk of
7 financial or other injury to an insurer, policyholder, creditor, or
8 other licensee of the commissioner, or any other person.

9 (B) Serves that subject person and the production agency with
10 written notice of the suspension order.

11 (C) Finds that all of the necessary factors are present that
12 would permit the commissioner, after notice and a hearing, to
13 issue an order pursuant to subdivision (b) removing a subject
14 person from his or her office or employment with the production
15 agency and prohibiting the subject person from participating in
16 any manner in the business of an insurer or production agency.

17 (2) Any suspension order issued pursuant to paragraph (1) of
18 this subdivision shall be effective until the date the commissioner
19 dismisses the charges contained in the notice served under
20 subdivision (b) or paragraph (1) of this subdivision, the effective
21 date of an order issued by the commissioner pursuant to
22 subdivision (b), or a court issues a stay of the order pursuant to
23 subdivision (d).

24 (d) Within 10 days after a subject person has been served with
25 an order of suspension pursuant to subdivision (c), the person
26 may apply to the superior court of the county in which the
27 principal office of the production agency is located for a stay of
28 the order pending completion of the proceedings pursuant to
29 subdivision (b), and the court shall have jurisdiction to issue an
30 order staying the suspension. Nothing in this subdivision shall be
31 deemed to authorize the court to issue a stay order on an ex parte
32 basis.

33 (e) (1) If the commissioner finds both of the following, he or
34 she shall immediately issue an order suspending a subject person
35 from the person's office or employment with a production
36 agency and prohibiting the subject person from participating in
37 any manner in the conduct of the business of an insurer or
38 production agency, except with the prior consent of the
39 commissioner.

~~(A) That the subject person has been charged in an indictment issued by a grand jury, or in an information, complaint, or similar pleading issued by a United States attorney, district attorney, or other governmental official or agency authorized to prosecute crimes, with a crime punishable by imprisonment for a term exceeding one year that involves any of the following:~~

~~(i) Fraud.~~

~~(ii) An act of dishonesty in the acceptance, custody, or payment of money or property.~~

~~(iii) Theft, embezzlement, misappropriation of moneys or property, participation in a ponzi scheme, or breach of fiduciary duty or trust.~~

~~(iv) Financial or physical abuse of an elder, or dependent adult.~~

~~(v) An act of misconduct while acting as a caretaker for the client or victim. "Caretaker" means any person who has the care, custody, or control of, or who stands in a position of trust with an elder or a dependent adult as those terms are defined in subdivisions (g) and (h) of Section 368 of the Penal Code.~~

~~(vi) An act that may be prosecuted criminally under any statute or regulation, including any provision of this code, relating to insurance, securities, tax, or banking.~~

~~(vii) An organized crime ring, money laundering, or a violation of the federal Racketeering Influenced and Corrupt Organizations Act (RICO).~~

~~(viii) The commission of the crime while the defendant was engaged in the business of insurance.~~

~~(ix) Any matter that relates to the business of insurance and that is set forth in the indictment, information, complaint, or other pleading.~~

~~(B) That a failure to immediately issue the order may result in an immediate risk that an insurer will be materially deficient with respect to one or more of the items set forth in Section 717, or may otherwise result in an immediate risk of financial or other injury to an insurer, policyholder, creditor, or other licensee of the commissioner, or any other person.~~

~~If the criminal proceedings are terminated other than by judgment of conviction, an order issued pursuant to paragraph (1) of this subdivision shall be deemed rescinded as if it had not been issued.~~

1 ~~(2) If the commissioner finds both of the following, he or she~~
2 ~~may immediately issue an order removing a subject person from~~
3 ~~the person's office or employment with a production agency and~~
4 ~~prohibiting the subject person from participating in any manner~~
5 ~~in the business of an insurer or production agency, except with~~
6 ~~the prior consent of the commissioner:~~

7 ~~(A) That the person has during the preceding five years been~~
8 ~~convicted of a crime that is punishable by imprisonment for a~~
9 ~~term exceeding one year.~~

10 ~~(B) That a failure to immediately issue the order may result in~~
11 ~~an immediate risk that an insurer will be materially deficient with~~
12 ~~respect to one or more of the items set forth in Section 717, or~~
13 ~~may otherwise result in an immediate risk of financial or other~~
14 ~~injury to an insurer, policyholder, creditor, or other licensee of~~
15 ~~the commissioner, or any other person.~~

16 ~~(3) The fact that any subject person charged with a crime is~~
17 ~~not convicted of that crime shall not preclude the commissioner~~
18 ~~from issuing an order regarding the subject person pursuant to~~
19 ~~other provisions of this code.~~

20 ~~(f) (1) Within 30 days after an order is issued pursuant to~~
21 ~~subdivision (e) or (c), the subject person to whom the order is~~
22 ~~issued may choose to do either of the following:~~

23 ~~(A) File with the commissioner an application for a hearing on~~
24 ~~the order. The commissioner shall, upon the written request of~~
25 ~~the subject person, extend the 30-day period within which to file~~
26 ~~an application for a hearing by an additional 30 days provided the~~
27 ~~request is filed with the commissioner within 30 days after the~~
28 ~~order is issued. If the commissioner fails to commence the~~
29 ~~hearing within 15 business days after the application is filed, or~~
30 ~~within a longer period of time to which the subject person~~
31 ~~consents, the order shall be deemed rescinded as if it had not~~
32 ~~been issued. Within 30 days after receipt of the proposed~~
33 ~~decision, the commissioner shall affirm, modify, or rescind the~~
34 ~~order; otherwise, the order shall be deemed rescinded as if it had~~
35 ~~not been issued.~~

36 ~~(B) Petition for judicial review of the order pursuant to Section~~
37 ~~1085 of the Code of Civil Procedure, where the court shall~~
38 ~~exercise its independent judgment on the evidence.~~

39 ~~(2) The right of any subject person to whom an order is issued~~
40 ~~pursuant to subdivision (e) or (c) to petition for judicial review of~~

1 the order shall not be affected by the failure of that subject
2 person to apply to the commissioner for a hearing on the order as
3 provided by this subdivision.

4 (g) (1) Any person to whom an order is issued pursuant to
5 subdivision (b), (c), or (e) may apply to the commissioner to
6 modify or rescind the order. The commissioner shall not grant the
7 application unless he or she finds that it is reasonable to believe
8 that the person will, if and when he or she becomes a subject
9 person, comply with all of the applicable provisions of this code
10 and of any regulation or order issued thereunder.

11 (2) The right of any subject person to whom an order is issued
12 pursuant to subdivision (b), (c), or (e) to petition for judicial
13 review of the order shall not be affected by the failure of that
14 subject person to apply to the commissioner pursuant to
15 paragraph (1).

16 (h) (1) It is unlawful for any subject person or former subject
17 person to whom an order is issued pursuant to subdivision (b),
18 (c), or (e) to do any of the following as long as the order is in
19 effect, except with the prior consent of the commissioner:

20 (A) To serve or act as a subject person for any insurer or
21 production agency.

22 (B) To directly or indirectly vote any shares or other securities
23 of an insurer or production agency.

24 (2) If, after notice and a hearing, the commissioner finds that
25 any subject person has violated paragraph (1) of this subdivision,
26 the commissioner may order that subject person to pay to the
27 commissioner a civil penalty, which may be recovered in a civil
28 action, in an amount the commissioner may specify; provided
29 however, that the amount of the civil penalty shall not exceed
30 one thousand dollars (\$1,000) for each day for which the
31 violation continues.

32 In determining the amount of civil penalty to be paid to the
33 commissioner under this paragraph, the commissioner shall
34 consider the financial resources and good faith of the subject
35 person charged, the gravity of the violation, the history of
36 previous violations by the person, and other factors as in the
37 opinion of the commissioner may be relevant.

38 (3) If, after notice and a hearing, the commissioner finds that
39 any production agency has knowingly aided and abetted a subject
40 person in a violation of paragraph (1) of this subdivision, or

1 subdivision (h) of Section 728, the commissioner may order that
2 production agency to pay to the commissioner a civil penalty in
3 an amount the commissioner may specify; provided however,
4 that the amount of the civil penalty shall not exceed one thousand
5 dollars (\$1,000) for each violation or in the case of a continuing
6 violation, one thousand dollars (\$1,000) for each day for which
7 the violation continues, up to a maximum of fifty thousand
8 dollars (\$50,000). Continuation of the subject person's salary or
9 other employee benefits pending final disposition shall not be
10 considered aiding and abetting a subject person.

11 In determining the amount of civil penalty to be paid to the
12 commissioner under this paragraph, the commissioner shall
13 consider the financial resources and good faith of the subject
14 person charged, the gravity of the violation, the history of
15 previous violations by the person, and other factors as in the
16 opinion of the commissioner may be relevant.

17 (i) Except as otherwise provided by this section, any hearing
18 required by this section shall be conducted in accordance with
19 Chapter 5 (commencing with Section 11500) of Part 1 of
20 Division 3 of Title 2 of the Government Code, subject to the
21 following:

22 (1)
23 Where judicial review is sought by the subject person pursuant
24 to Section 1085 of the Code of Civil Procedure, the court shall
25 exercise its independent judgment upon the evidence.

26 (2) When a subject person to whom an order has been issued
27 pursuant to subdivision (c) or (e) applies to the commissioner for
28 a hearing pursuant to subparagraph (A) of paragraph (1) of
29 subdivision (f), the Office of Administrative Hearings shall
30 schedule the hearing on a priority basis at the earliest possible
31 time and once the hearing is commenced, it shall not be
32 continued for more than three business days without the consent
33 of the subject person.

34 (3) If the Office of Administrative Hearings cannot schedule
35 the commencement of a hearing within 15 business days as
36 provided by paragraph (1) of subdivision (f), and the subject
37 person does not waive his or her right to a hearing commencing
38 within 15 days, the hearings may be conducted by administrative
39 law judges appointed by the commissioner; the hearing shall be
40 completed within 45 days of commencement, unless additional

1 time is requested by the subject person. If the hearing is not
2 completed within the 45 days, the order shall be deemed
3 rescinded as if it had not been issued. The scheduling of other
4 hearings before the administrative law judge shall not be
5 considered good cause for purposes of this paragraph.

6 (j) ~~Nothing in this section is intended to or shall be construed~~
7 ~~to create a private cause of action against an offending subject~~
8 ~~person or insurer or production agency that aids and abets a~~
9 ~~subject person, based on the standards established by this section~~
10 ~~or the commissioner's findings or orders pursuant to this section.~~

11 SEC. 3.

12 *SECTION 1.* Section 1871.7 of the Insurance Code is
13 amended to read:

14 1871.7. (a) It is unlawful to knowingly employ runners,
15 cappers, steerers, or other persons to procure clients or patients to
16 perform or obtain services or benefits pursuant to Division 4
17 (commencing with Section 3200) of the Labor Code or to
18 procure clients or patients to perform or obtain services or
19 benefits under a contract of insurance or that will be the basis for
20 a claim against an insured individual or his or her insurer.

21 (b) Every person who violates any provision of this section or
22 Section 549, 550, or 551 of the Penal Code shall be subject, in
23 addition to any other penalties that may be prescribed by law, to
24 a civil penalty of not less than five thousand dollars (\$5,000) nor
25 more than ten thousand dollars (\$10,000), plus an assessment of
26 not more than three times the amount of each claim for
27 compensation, as defined in Section 3207 of the Labor Code or
28 pursuant to a contract of insurance. The court shall have the
29 power to grant other equitable relief, including temporary
30 injunctive relief, as is necessary to prevent the transfer,
31 concealment, or dissipation of illegal proceeds, or to protect the
32 public. The penalty prescribed in this paragraph shall be assessed
33 for each fraudulent claim presented to an insurance company by
34 a defendant and not for each violation.

35 (c) The penalties set forth in subdivision (b) are intended to be
36 remedial rather than punitive, and shall not preclude, nor be
37 precluded by, a criminal prosecution for the same conduct. If the
38 court finds, after considering the goals of disgorging unlawful
39 profit, restitution, compensating the state for the costs of
40 investigation and prosecution, and alleviating the social costs of

1 increased insurance rates due to fraud, that such a penalty would
2 be punitive and would preclude, or be precluded by, a criminal
3 prosecution, the court shall reduce that penalty appropriately.

4 (d) The district attorney or commissioner may bring a civil
5 action under this section. Before the commissioner may bring
6 that action, the commissioner shall be required to present the
7 evidence obtained to the appropriate local district attorney for
8 possible criminal or civil filing. If the district attorney elects not
9 to pursue the matter due to insufficient resources, then the
10 commissioner may proceed with the action.

11 (e) (1) Any interested persons, including an insurer, may
12 bring a civil action for a violation of this section for the person
13 and for the State of California. The action shall be brought in the
14 name of the state. The action may be dismissed only if the court
15 and the district attorney or the commissioner, whichever is
16 participating, give written consent to the dismissal and their
17 reasons for consenting.

18 (2) A copy of the complaint and written disclosure of
19 substantially all material evidence and information the person
20 possesses shall be served on the district attorney and
21 commissioner. The complaint shall be filed in camera, shall
22 remain under seal for at least 60 days, and shall not be served on
23 the defendant until the court so orders. The local district attorney
24 or commissioner may elect to intervene and proceed with the
25 action within 60 days after he or she receives both the complaint
26 and the material evidence and information. If more than one
27 governmental entity elects to intervene, the district attorney shall
28 have precedence.

29 (3) The district attorney or commissioner may, for good cause
30 shown, move the court for extensions of the time during which
31 the complaint remains under seal under paragraph (2). The
32 motions may be supported by affidavits or other submissions in
33 camera. The defendant shall not be required to respond to any
34 complaint filed under this section until 20 days after the
35 complaint is unsealed and served upon the defendant.

36 (4) Before the expiration of the 60-day period or any
37 extensions obtained under paragraph (3), the district attorney or
38 commissioner shall either:

39 (A) Proceed with the action, in which case the action shall be
40 conducted by the district attorney or commissioner.

1 (B) Notify the court that it declines to take over the action, in
2 which case the person bringing the action shall have the right to
3 conduct the action.

4 (5) When a person or governmental agency brings an action
5 under this section, no person other than the district attorney or
6 commissioner may intervene or bring a related action based on
7 the facts underlying the pending action unless that action is
8 authorized by another statute or common law.

9 (f) (1) If the district attorney or commissioner proceeds with
10 the action, he or she shall have the primary responsibility for
11 prosecuting the action, and shall not be bound by an act of the
12 person bringing the action. That person shall have the right to
13 continue as a party to the action, subject to the limitations set
14 forth in paragraph (2).

15 (2) (A) The district attorney or commissioner may dismiss the
16 action notwithstanding the objections of the person initiating the
17 action if the person has been notified by the district attorney or
18 commissioner of the filing of the motion, and the court has
19 provided the person with an opportunity for a hearing on the
20 motion.

21 (B) The district attorney or commissioner may settle the action
22 with the defendant notwithstanding the objections of the person
23 initiating the action if the court determines, after a hearing, that
24 the proposed settlement is fair, adequate, and reasonable under
25 all the circumstances. Upon a showing of good cause, the hearing
26 may be held in camera.

27 (C) Upon a showing by the district attorney or commissioner
28 that unrestricted participation during the course of the litigation
29 by the person initiating the action would interfere with or unduly
30 delay the district attorney's or commissioner's prosecution of the
31 case, or would be repetitious, irrelevant, or for purposes of
32 harassment, the court may, in its discretion, impose limitations
33 on the person's participation, including, but not limited to, the
34 following:

- 35 (i) Limiting the number of witnesses the person may call.
36 (ii) Limiting the length of the testimony of those witnesses.
37 (iii) Limiting the person's cross-examination of witnesses.
38 (iv) Otherwise limiting the participation by the person in the
39 litigation.

1 (D) Upon a showing by the defendant that unrestricted
2 participation during the course of the litigation by the person
3 initiating the action would be for purposes of harassment or
4 would cause the defendant undue burden or unnecessary expense,
5 the court may limit the participation by the person in the
6 litigation.

7 (3) If the district attorney or commissioner elects not to
8 proceed with the action, the person who initiated the action shall
9 have the right to conduct the action. If the district attorney or
10 commissioner so requests, he or she shall be served with copies
11 of all pleadings filed in the action and shall be supplied with
12 copies of all deposition transcripts, at the district attorney's or
13 commissioner's expense. When a person proceeds with the
14 action, the court, without limiting the status and rights of the
15 person initiating the action, may nevertheless permit the district
16 attorney or commissioner to intervene at a later date upon a
17 showing of good cause.

18 (4) If at any time both a civil action for penalties and equitable
19 relief pursuant to this section and a criminal action are pending
20 against a defendant for substantially the same conduct, whether
21 brought by the government or a private party, the civil action
22 shall be stayed until the criminal action has been concluded at the
23 trial court level. The stay shall not preclude the court from
24 granting or enforcing temporary equitable relief during the
25 pendency of the actions. Whether or not the district attorney or
26 commissioner proceeds with the action, upon a showing by the
27 district attorney or commissioner that certain actions of discovery
28 by the person initiating the action would interfere with a law
29 enforcement or governmental agency investigation or
30 prosecution of a criminal or civil matter arising out of the same
31 facts, the court may stay discovery for a period of not more than
32 180 days. A hearing on a request for the stay shall be conducted
33 in camera. The court may extend the 180-day period upon a
34 further showing in camera that the agency has pursued the
35 criminal or civil investigation or proceedings with reasonable
36 diligence and any proposed discovery in the civil action will
37 interfere with the ongoing criminal or civil investigation or
38 proceedings.

1 (5) Notwithstanding subdivision (e), the district attorney or
2 commissioner may elect to pursue its claim through any alternate
3 remedy available to the district attorney or commissioner.

4 (g) (1) (A) If the district attorney or commissioner proceeds
5 with an action brought by a person under subdivision (e), that
6 person shall, subject to subparagraph (B), receive at least 30
7 percent but not more than 40 percent of the proceeds of the
8 action or settlement of the claim, depending upon the extent to
9 which the person substantially contributed to the prosecution of
10 the action.

11 (B) Where the action is one that the court finds to be based
12 primarily on disclosures of specific information, other than
13 information provided by the person bringing the action, relating
14 to allegations or transactions in a criminal, civil, or
15 administrative hearing, in a legislative or administrative report,
16 hearing, audit, or investigation, or from the news media, the court
17 may award those sums that it considers appropriate, but in no
18 case more than 10 percent of the proceeds, taking into account
19 the significance of the information and the role of the person
20 bringing the action in advancing the case to litigation.

21 (C) Any payment to a person under subparagraph (A) or under
22 subparagraph (B) shall be made from the proceeds. The person
23 shall also receive an amount for reasonable expenses that the
24 court finds to have been necessarily incurred, plus reasonable
25 attorney's fees and costs. All of those expenses, fees, and costs
26 shall be awarded against the defendant.

27 (2) (A) If the district attorney or commissioner does not
28 proceed with an action under this section, the person bringing the
29 action or settling the claim shall receive an amount that the court
30 decides is reasonable for collecting the civil penalty and
31 damages. Except as provided in subparagraph (B), the amount
32 shall not be less than 40 percent and not more than 50 percent of
33 the proceeds of the action or settlement and shall be paid out of
34 the proceeds. The parties shall serve the commissioner and the
35 local district attorney with complete copies, signed by the parties,
36 of any and all settlements of actions brought under this article.
37 No settlement shall be binding and enforceable until 25 days
38 after the settlement has been served on the commissioner.

39 (B) If the person bringing the action, as a result of a violation
40 of this section has paid money to the defendant or to an attorney

1 acting on behalf of the defendant in the underlying claim, then he
2 or she shall be entitled to up to double the amount paid to the
3 defendant or the attorney if that amount is greater than 50 percent
4 of the proceeds. That person shall also receive an amount for
5 reasonable expenses that the court finds to have been necessarily
6 incurred, plus reasonable attorney's fees and costs. All of those
7 expenses, fees, and costs shall be awarded against the defendant.

8 (C) If the commissioner has proceeded with an action under
9 this section *on or after January 1, 2006, and prior to January 1,*
10 *2011*, the commissioner shall be entitled to attorneys' fees and
11 costs in addition to any judgment, *regardless of the date that*
12 *judgment is entered*. The court shall determine the amount of
13 attorneys' fees, including, but not limited to, fees for time
14 expended by attorneys employed by the department, and for costs
15 incurred. Any attorneys' fees or costs awarded to the
16 commissioner and collected shall be deposited in the Insurance
17 Fund. The penalties not awarded to a private party, after
18 satisfaction of the amount of attorneys' fees and costs incurred
19 by the commissioner, shall be deposited in the General Fund and,
20 upon appropriation by the Legislature, shall be apportioned
21 between the Department of Justice and the Department of
22 Insurance for enhanced fraud investigation and prevention
23 efforts.

24 (3) If a local district attorney has proceeded with an action
25 under this section, one-half of the penalties not awarded to a
26 private party, as well as any costs awarded shall go to the
27 treasurer of the appropriate county. Those funds shall be used to
28 investigate and prosecute fraud, augmenting existing budgets
29 rather than replacing them. All remaining funds shall go to the
30 state and be deposited in the General Fund and, when
31 appropriated by the Legislature, shall be apportioned between the
32 Department of Justice and the Department of Insurance for
33 enhanced fraud investigation and prevention efforts.

34 (4) Whether or not the district attorney or commissioner
35 proceeds with the action, if the court finds that the action was
36 brought by a person who planned and initiated the violation of
37 this section, that person shall be dismissed from the civil action
38 and shall not receive any share of the proceeds of the action. The
39 dismissal shall not prejudice the right of the district attorney or
40 commissioner to continue the action on behalf of the state.

(5) If the district attorney or commissioner does not proceed with the action, and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney's fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(h) (1) In no event may a person bring an action under subdivision (e) that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the Attorney General, district attorney, or commissioner is already a party.

(2) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing in a legislative or administrative report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the district attorney or commissioner before filing an action under this section which is based on the information.

(i) Except as provided in subdivision (j), the district attorney or commissioner is not liable for expenses that a person incurs in bringing an action under this section.

(j) In civil actions brought under this section in which the commissioner or a district attorney is a party, the court shall retain discretion to impose sanctions otherwise allowed by law, including the ability to order a party to pay expenses as provided in Sections 128.5 and 1028.5 of the Code of Civil Procedure.

(k) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section,

shall be entitled to all relief necessary to make the employee whole. That relief shall include reinstatement with the same seniority status the employee would have had but for the discrimination, two times the amount of backpay, interest on the backpay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An employee may bring an action in the appropriate superior court for the relief provided in this subdivision. The remedies under this section are in addition to any other remedies provided by existing law.

(l) (1) An action pursuant to this section may not be filed more than three years after the discovery of the facts constituting the grounds for commencing the action.

(2) Notwithstanding paragraph (1) no action may be filed pursuant to this section more than eight years after the commission of the act constituting a violation of this section or a violation of Section 549, 550, or 551 of the Penal Code.

~~SEC. 4.~~

SEC. 2. Section 1879.3 of the Insurance Code is amended to read:

1879.3. The commissioner shall appoint supervisory and investigatory personnel within the bureau. In addition, the commissioner shall assign ~~attorneys employed by the department and staff counsel who are employed by the department and are~~ under the supervision of the department's General Counsel to advise the department's Fraud Division, and to further the purposes of this article and Article 1 (commencing with Section 1871). The attorneys' duties may include representing the commissioner and the department in civil lawsuits pursuant to Article 1 (commencing with Section 1871). Those persons shall be qualified by training and experience to perform the duties of their position.

When so requested by the commissioner, the Attorney General may assign one or more deputy attorneys general to assist the commissioner in the performance of these duties.

~~SEC. 5.~~

SEC. 3. Section 12921.8 of the Insurance Code is amended to read:

12921.8. (a) The commissioner may do the following:

1 (1) Issue a cease and desist order to a person who has acted in
2 a capacity for which a license, registration, or certificate of
3 authority from the commissioner was required but not possessed.

4 (2) Issue a cease and desist order to a person who has aided or
5 abetted a person described in paragraph (1).

6 (3) Impose a monetary penalty, pursuant to an order to show
7 cause, on a person described in paragraph (1) or (2). The
8 monetary penalty shall be the greater of the following:

9 (A) Five times the amount of money received by the person
10 for acting in the capacity for which the license, registration, or
11 certificate of authority was required but not possessed.

12 (B) Five thousand dollars (\$5,000) for each day the person
13 acted in the capacity for which the license, registration, or
14 certificate of authority was required but not possessed. In the
15 absence of contrary evidence, it shall be presumed that a person
16 continuously acted in a capacity for which a license, registration,
17 or certificate of authority was required on each day from the date
18 of the earliest such act until the date those acts were
19 discontinued, as proven by the person at a hearing.

20 (b) *Notwithstanding paragraph (3) of subdivision (a), the*
21 *commissioner shall not impose a monetary penalty on a person*
22 *who has, without a license, acted in a capacity for which a*
23 *license or registration was required pursuant to Chapter 5*
24 *(commencing with Section 1621), Chapter 6, (commencing with*
25 *Section 1760), Chapter 7 (commencing with Section 1800), or*
26 *Chapter 8 (commencing with Section 1831) of Part 2 of Division*
27 *1, or a person who aided or abetted such a person, unless the*
28 *conduct was in intentional or clearly negligent disregard of the*
29 *requirement for a license or registration.*

30 (c) A person to whom a cease and desist order or order to
31 show cause has been issued, may, within seven days after service
32 of the order, if a hearing has not already been scheduled by the
33 commissioner, request a hearing by filing a request for the
34 hearing with the commissioner. The hearing shall be conducted
35 in accordance with the Administrative Procedure Act (Chapter
36 3.5 (commencing with Section 11340), Chapter 4 (commencing
37 with Section 11370), Chapter 4.5 (commencing with Section
38 11400), and Chapter 5 (commencing with Section 11500) of Part
39 1 of Division 3 of Title 2 of the Government Code), and the
40 commissioner shall have all the powers granted therein.

(e)

(d) A person who has a hearing pursuant to subdivision (b) shall be entitled to have the proceedings and the order of the commissioner reviewed by means of any remedy provided by the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code).

SEC. 6. ~~Section 12921.95 is added to the Insurance Code, to read:~~

~~12921.95. In addition to any other disciplinary measures the commissioner may take, whenever the commissioner finds that a licensee's violation of a provision of this code has resulted in loss to individual insureds or claimants, designated classes of insureds or claimants, insurers, or production agents, the commissioner may, by way of settlement or decision, following a hearing if one is requested, order the payment of restitution upon the terms and conditions that the commissioner, in the reasonable exercise of discretion, may require. Any hearing shall be conducted in accordance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code). It shall not be a defense in a private civil action that the commissioner did not order the payment of restitution to individual insureds or claimants, designated classes of insureds or claimants, insurers, or production agents pursuant to this subdivision.~~